No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES,

Petitioner,

v.

LORETTA E. LYNCH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the Immigration and Nationality Act ("INA"), Congress classified some offenses as aggravated felonies by using their generic names. These include murder and rape, among others—but not arson. Congress classified other offenses as aggravated felonies by referring to crimes "described in" specified federal statutes. One such crime is the one "described in" 18 U.S.C. § 844(i), the federal arson statute. If Congress's choice is to be respected, "arson" in the generic sense is not an aggravated felony. The only arson that is an aggravated felony is the arson "described in" section 844(i), which prohibits the burning of property "used in interstate or foreign commerce," and which is a serious felony punishable by a five-year minimum prison sentence.

Congress's choice is readily understandable. Not all arsons are serious offenses. Some are, but, as the government does not dispute, others are low-level offenses punished by the states with little or no jail time. Many arsons are punished only as misdemeanors. Arson is quite different in this respect from offenses like murder and rape. Congress thus had no reason to classify all arsons as aggravated felonies.

The government strains to offer excuses for ignoring Congress's choice of words, but none can hold up to scrutiny. Under the plain meaning of the statute, generic arson is not an aggravated felony. And even if the statute were ambiguous, the BIA's view is not entitled to deference.

I. Congress chose not to classify generic arson as an aggravated felony.

The government proffers several arguments for treating generic arson as an aggravated felony despite Congress's choice to the contrary. But none of the government's arguments can overcome the text of the statute.

First, the government supposes that Congress legislated against a "legal backdrop," U.S. Br. 16, in which "jurisdictional elements are not substantive or material elements of an offense," *id.* at 17. But there is no such backdrop. The background rule is precisely the opposite: Where an offense includes a so-called "jurisdictional" element such as a nexus to interstate commerce, that element is treated just like any other. *Jones v. United States*, 529 U.S. 848, 859 (2000); *United States v. Bass*, 404 U.S. 336, 347 (1971). "Jurisdictional" is not a magic word commanding courts or agencies to depart from their usual interpretive practices. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013). Immigration officials have no license to decide which elements of criminal statutes are more important than others.

Congress legislated with knowledge of a second background rule as well—the categorical approach, which requires an element-by-element comparison between the offense of conviction and the deportation ground at issue. The categorical approach was well established when Congress enacted the INA's aggravated felony definition. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (noting the categorical approach's "long pedigree," dating at least to 1913).

Immigration officials employing the categorical approach have never been understood to possess the authority to ignore elements of offenses. *See Lopez v. Gonzalez*, 549 U.S. 47, 57 (2006) ("a state offense whose elements include the elements of a felony punishable under [the specified federal statute] is an aggravated felony").

The penultimate sentence of the aggravated felony definition—"The term applies to an offense described in this paragraph whether in violation of Federal or State law"—cannot sensibly be read to direct immigration officials to ignore elements of offenses. The penultimate sentence was added for a different reason, to codify the outcome of *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990), in which the BIA determined that the defined generic term "drug trafficking crime" includes state crimes as well as federal crimes. *Lopez*, 549 U.S. at 57 n.8. The penultimate sentence's inclusion of *offenses*, rather than *conduct*, in violation of state or federal law indicates that Congress intended no departure from the categorical approach.

The government's invented "backdrop" would cause the INA's aggravated felony definition to sweep in huge categories of offenses Congress cannot conceivably have intended to include. For example, subsection E of the aggravated felony definition makes "an offense described in" 18 U.S.C. § 844(f) an aggravated felony. Section 844(f) prohibits the destruction of property "owned or possessed by ... the United States." On the government's view, with this "jurisdictional" element disregarded, every act of

vandalism, of property owned by anyone, everywhere, under all circumstances, would be an aggravated felony. Subsection H of the aggravated felony definition makes "an offense described in" 18 U.S.C. § 876 an aggravated felony. Section 876 forbids the sending of threatening communications "by the Postal Service." On the government's view, with this "jurisdictional" element ignored, all threats sent by any medium would be aggravated felonies.

The government's ostensible examples of its "backdrop" are nothing of the kind. The federal three-strikes statute (U.S. Br. 18-19) is worded very differently from the INA's aggravated felony definition. All the offenses in the three-strikes statute are referred to by their generic names. 18 U.S.C. § 3559(c)(2)(F)(i). While some of the listed generic offenses include a parenthetical illustrative reference to criminal conduct "*as* described in" a U.S. Code section falling within the generic category, *id.* (emphasis added), the focus of the three-strikes statute remains on the generic offenses listed. These generic offenses have no interstate commerce elements, so the question in our case cannot arise under the three-strikes statute. The question in our case concerns the specific federal offenses referenced in the INA's aggravated felony definition. This is a question on which cases interpreting the three-strikes statute can offer no guidance, because the three-strikes statute includes no such offenses.

Moreover, the three-strikes statute includes a broad prefatory clause specifying that it includes offenses "by whatever designation and wherever com-

mitted," a clause that is more inclusive than the penultimate sentence of the INA's aggravated felony definition, which lacks the "by whatever designation" language. *Id.* This clause has been interpreted by the lower courts as a specific directive from Congress to ignore "jurisdictional" elements when considering state offenses. *United States v. Wicks*, 132 F.3d 383, 386-87 (7th Cir. 1997); *United States v. Rosario-Delgado*, 198 F.3d 1354, 1357 (11th Cir. 1999). The lower court cases interpreting the three-strikes statute thus do not form a "backdrop" influencing the interpretation of the INA's aggravated felony definition, because the two statutes use different language to serve different purposes.

The three-strikes statute does happen to be instructive, although not in the way the government intends. One of the offenses the statute mentions solely by its generic name is "arson." 18 U.S.C. § 3559(c)(2)(F)(i). The three-strikes statute is thus yet another example of a point we made in our opening brief (Pet. Br. 21-22): When Congress wants to refer generically to arson, it uses the word "arson." But Congress did not use the word "arson" in the INA's aggravated felony definition.

The other ostensible examples of the government's invented "backdrop" are equally inapposite. The Assimilative Crimes Act (U.S. Br. 19-20) is worded much more broadly than the INA's aggravated felony definition. Rather than referring to offenses "described in" a federal statute, the Assimilative Crimes Act refers to "any act or omission" punishable under state law. 18 U.S.C. § 13(a). This broader language,

focusing on the defendant's conduct rather than the elements of an offense, reflects the unique purpose of the Assimilative Crimes Act, that of "borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Lewis v. United States*, 523 U.S. 155, 160 (1998). The Assimilative Crimes Act is not a "backdrop" for interpreting the INA's aggravated felony definition, which uses completely different wording to serve a completely different purpose.

Nor can a "backdrop" be woven from extradition treaties (U.S. Br. 20-21), which, by the government's own admission, often specifically state that "jurisdictional" elements are to be ignored. If these treaties show anything, it is that when Congress wants to exclude "jurisdictional" elements, it does so explicitly. *See, e.g.*, 18 U.S.C. §§ 3142(e)(2)(A), 3142(f)(1)(D) (both requiring pretrial detention of a person convicted of a state offense that would have been a federal offense "if a circumstance giving rise to Federal jurisdiction had existed"); 18 U.S.C. § 5032 (requiring a juvenile to be tried as an adult if he has been convicted of a state offense that would have been a federal offense "if a circumstance giving rise to Federal jurisdiction had existed"). But Congress did not do so in the INA's aggravated felony definition.

Nor, finally, can a "backdrop" be found in decisions interpreting the mens rea requirements of criminal statutes (U.S. Br. 21-22). The fact that Congress often chooses not to require a mens rea for the interstate commerce element of a crime tells us nothing about whether Congress chose to classify

generic arson as an aggravated felony in the INA. To answer the latter question, the appropriate place to look is the text of the INA, not a hodge-podge of lower court cases interpreting the mens rea requirements of various unrelated criminal statutes.

The government's "backdrop" rests on a remarkable assertion of executive branch authority, under which immigration officials would have discretion to read elements out of federal crimes. There is no such backdrop.

Second, the government mistakenly asserts (U.S. Br. 22-24) that "described in" is a looser term than "defined in." On the government's view, *describing* merely entails "conveying central features," *id.* at 17, so that an offense is "described in" a statute even if the offense includes some, but not all, of the elements found in the statute.

It is hard to imagine an argument more destabilizing to the practice of statutory interpretation, because the argument cannot be cabined to so-called "jurisdictional" elements of crimes. If "described in" merely requires rough approximation, any element could be ignored, so long as a judge finds that the element is not a "central feature" of the statute. Indeed, the government's view would license a judge to ignore *any* statutory language the judge happens to find non-central, whenever one statute refers to matter "described in" another. As we showed in our opening brief (Pet. Br. 17-18), there are thousands of instances in the U.S. Code in which Congress refers to something "described in" a statute. If "described in" actually means "sharing the central features of,"

statutory interpretation will be a far more freewheeling enterprise than it is today.

Even if the government's argument could somehow be limited to "jurisdictional" elements, it would raise more questions than it answers. For example, 18 U.S.C. § 844(f) prohibits damage to several types of property "owned or possessed by, or leased to, the United States" or any "organization receiving Federal financial assistance." The government does not say whether "an idea or impression of" (U.S. Br. 17) that offense without the "jurisdictional" element would extend to damage of all privately-owned property, or perhaps property owned by state or local governments, or maybe property owned by organizations. There is a good reason judges are not in the business of declaring their "ideas" or "impressions" of offenses.

The dictionary definitions cherry-picked by the government (U.S. Br. 17) do not even support its contention that "described in" means "sharing the central features of." None gives that definition for "described." None says that "described" is a looser term than "defined." One of the definitions quoted by the government—"trace or traverse the outline of"—is the specialized meaning of *describe* used in geometry, as in the use of a compass to describe a circle, a meaning that Congress is unlikely to have used in the geometry-free INA.

There is a much simpler explanation for Congress's use of "defined in" and "described in." Section 1101(a)(43) uses "defined in" five times. Each time, the thing being referred to is formally designated as

a definition. *See* subsection B (referring to 21 U.S.C. § 802, titled "Definitions," and 18 U.S.C. § 924(c), providing that "the term 'drug trafficking crime' means any felony punishable under" specified statutes); subsection C (referring to 18 U.S.C. § 921, titled "Definitions," and 18 U.S.C. § 841, also titled "Definitions"); subsection F (referring to 18 U.S.C. § 16, titled "Crime of violence defined"). In the U.S. Code generally, when a statute refers to a Code section that is formally designated as a definition, it uses "defined in," pursuant to the drafting manuals used by both houses of Congress. Pet. Br. 19-20. By contrast, whenever section 1101(a)(43) uses "described in," the statute referred to is not formally designated as a definition, but is rather a statute setting forth the elements of an offense.

The government tries (U.S. Br. 23) to undermine this distinction by asserting that "ordinary federal criminal statutes are themselves definitions." But while this may be half-true in a metaphorical sense, it is not true at all in the literal sense. Section 1101(a)(43) uses "defined in" only to refer to Code sections formally designated as definitions. Otherwise it uses "described in."

To be sure, one can find other statutes that do not observe this distinction as rigorously as section 1101(a)(43) does (*see* U.S. Br. 24), but even these other statutes do not use "described in" any more loosely than "defined in." The government has defended its non-literal reading of the aggravated felony definition for years, in seven circuits and now in this Court, and the government still cannot cite a

single instance in which the U.S. Code uses "described in" to mean "sharing the central features of."

Third, the government insists (U.S. Br. 25-28) that Congress could not have used the word "arson" to refer to generic arson, because of ostensible ambiguities in the term. But Congress often uses "arson" to refer to generic arson. Pet. Br. 21-22. The three-strikes statute is one conspicuous example, as mentioned above. Another is the Armed Career Criminal Act, in which Congress likewise used the same generic term. 18 U.S.C. § 924(e)(2)(B)(ii). Congress took the opposite approach in the INA's aggravated felony definition, by excluding arson from the list of generic offenses and making express reference to a federal statute instead.

The government similarly contends (U.S. Br. 26) that the word "arson" would not have covered the other explosives offenses listed in subsection E(i). But if Congress had wished to include generic arson along with these explosives offenses, subsection E(i) would have provided that aggravated felonies include "arson" as well as the explosives offenses "described in" 18 U.S.C. § 844, just as subsection K provides that aggravated felonies include managing a "prostitution business" as well as the prostitution-related offenses "described in" several specified statutes.

Fourth, the government notes (U.S. Br. 29-31) that in 2003 Congress added another "described in" provision to the list of aggravated felonies. But the government errs in inferring that by doing so, Congress expressed a view on the issue in this case. In

2003, the issue had been addressed by only one court, the Ninth Circuit. *See United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001). A single court decision, from only one of the twelve circuits, hardly amounts to the "uniform interpretation by inferior courts" needed to infer Congress's approval. *Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015) (citation and internal quotation marks omitted).[1]

More relevant than the 2003 amendment, which added only a single subparagraph, is the 1994 amendment, which added several provisions to the aggravated felony definition, including subsection E. Pub. L. No. 103-416, § 222, 108 Stat. 4320-22. At that time, Congress selected high sentence and monetary thresholds for many subsections, including a five-year prison requirement for theft or burglary (in subsection G), and Congress left intact the same five-year threshold for a crime of violence (in subsection F), making it all the more incongruous to read

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[1] Similarly unavailing is the government's attempt (U.S. Br. 43-44) to infer Congress's intent from the legislative history of the penultimate sentence of section 1101(a)(43). The penultimate sentence was meant to codify the outcome of *Matter of Barrett*, 20 I. & N. Dec. 171 (BIA 1990), in which the BIA determined that the defined term "drug trafficking crime" includes state offenses. *Lopez*, 549 U.S. at 57 n.8. The issue in our case did not arise in *Barrett*, which was decided when section 1101(a)(43) was much shorter and consisted entirely of offenses referred to by their generic names, some with reference to terms "defined in" federal statutes, such as "drug trafficking crime."

subsection E as encompassing convictions for misdemeanors or other crimes with minimal sentences.

Fifth, the government contends (U.S. Br. 31-42) that a literal reading of the INA's aggravated felony definition yields "haphazard coverage," *id.* at 37, in that some offenses classified as aggravated felonies are, in the government's view, "less grave by any measure," *id.* at 33, than other offenses not so classified. But this is an argument properly directed at Congress, not at a court. In a court, the question is not whether Congress chose wisely in declining to classify generic arson as an aggravated felony. The question is whether the statutory text embodying that choice is so absurd—whether the absurdity is "so gross as to shock the general or moral sense," *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)—that the text should not be read literally. Pet. Br. 32-33.

In any event, there was nothing haphazard about Congress's decision. Some arsons are not even felonies, much less serious felonies. At least eighteen states punish minor arsons as misdemeanors. NIJC/AILA Br. 8-10. Congress could not have wanted to classify all arsons, including all these misdemeanors, as aggravated felonies. It was thus not absurd for Congress to classify only federal arson as an aggravated felony, because federal arsons, which carry a minimum five-year sentence, tend to be much more serious than state arsons, some of which are punished with minimal fines or jail time, NACDL Br. 26-31, like the one-day sentence in this case.

The government professes (U.S. Br. 31-33) to fear that a literal reading of the aggravated felony definition will prevent the government from removing aliens who have been convicted of serious state or foreign offenses, but this fear is greatly exaggerated. Most serious state or foreign offenses are aggravated felonies under one or more of the 21 subsections of the INA's aggravated felony definition, or would trigger removal under one of the myriad other grounds for removal contained in the INA.

To use the government's own examples (*id.* at 33), an alien convicted in a state or foreign court of selling a child for the purpose of child pornography would likely be deemed by the government to have been convicted of an aggravated felony under subsection A of the aggravated felony definition (for sexual abuse of a minor), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(E) (for a crime against children), § 1227(a)(2)(F) (for trafficking), or § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). An alien convicted in a state or foreign court of receiving explosives for the purpose of killing another would likely be deemed to have been convicted of an aggravated felony under subsection F of the aggravated felony definition (for a crime of violence), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(C) (for a firearm or destructive device offense) or § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). An alien convicted in a state or foreign court of demanding a ransom for a kidnapping would likely be deemed to have been convicted of an aggravated

felony under subsection F of the aggravated felony definition (for a crime of violence), and would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(A)(i) (for a crime of moral turpitude if committed within five years of admission). And an alien convicted in a state or foreign court of possessing a firearm following a felony conviction would likely be deemed removable under 8 U.S.C. § 1227(a)(2)(C) (for a firearm offense).

Any serious state or foreign arson offense would also likely be deemed an aggravated felony under subsection F (for a crime of violence). *See In re Palacios-Pinera*, 22 I. & N. Dec. 434, 437 (BIA 1998). An alien convicted of arson in a state or foreign court would also likely be deemed removable under 8 U.S.C. § 1227(a)(2)(A)(i) (for a crime of moral turpitude). *See Vuksanovic v. Attorney General*, 439 F.3d 1308, 1311 (11th Cir. 2006).

Moreover, "[e]scaping aggravated felony treatment does not mean escaping deportation.... It means only avoiding mandatory removal." *Moncrieffe*, 133 S. Ct. at 1692. Where a serious state or foreign offense does not fall within the aggravated felony definition but fits within another removal ground, the government would still retain discretion to deny relief from removal if the offense is deemed serious enough.

The purpose of the INA is thus served just as well by reading the aggravated felony definition literally as that purpose would be served by accepting the government's invitation to distort the statutory text in order to define lower-level offenses, including

misdemeanors, as aggravated felonies. Under a literal reading, the government has ample authority to remove aliens who have been convicted of serious offenses.

In the end, the government's argument on this score boils down to the proposition that Congress chose "an unusually poor proxy for identifying less serious arson offenses." U.S. Br. 40. On the government's view, however, *all* arsons, no matter how trivial, would be classified as aggravated felonies, even arsons punished by the states as misdemeanors. That would be an even worse proxy for identifying the seriousness of arson offenses.

Sixth, the government's invocation of legislative history (U.S. Br. 42-45) does not, and indeed could not, contradict the text of the aggravated felony definition, which plainly makes federal arson, but not generic arson, an aggravated felony. In any event, the question before the Court is not whether members of Congress actually concluded that the inclusion of only federal arsons was a good way to avoid sweeping minor state arsons into the definition of aggravated felony. The question is whether this conclusion would have been so absurd that the statutory text should be disregarded. As we showed in our opening brief, Pet. Br. 32-38, it would not have been absurd at all.

This case is a perfect example. George Luna was convicted of attempted arson in the third degree, one of the less serious felonies in New York's penal code. He was sentenced to a single day in jail. If such a minor offense is an aggravated felony, barring the

discretionary relief of cancellation of removal, it is hard to imagine an offense that would not be. Meanwhile, Luna is exactly the kind of person for whom the discretionary relief of cancellation of removal was intended. He has spent almost his whole life in the United States. He is a gainfully employed homeowner who put his fiancée through graduate school. Sixteen years have passed since his sole brush with the law. The whole point of cancellation of removal is to vest the Attorney General with discretion to consider such circumstances before determining whether Luna will be removed. But if Luna's one-day jail sentence was for an aggravated felony, the Attorney General will not be able to exercise that discretion. This case shows the wisdom in Congress's decision not to classify generic arson as an aggravated felony.

II. The BIA's view is not entitled to deference.

The government advances (U.S. Br. 47-52) an extraordinarily aggressive view of *Chevron* deference, under which *Chevron* obliterates every other canon of statutory interpretation, including the two canons that govern this case, the rule of lenity for statutes with criminal applications and the principle of construing deportation statutes in favor of the alien. The government's view is contradicted by precedent and by common sense.

First, if the Court finds the aggravated felony definition ambiguous, the rule of lenity applies. As the government concedes (U.S. Br. 47-48), the aggravated felony definition has important criminal applica-

tions. Illegal reentry, 8 U.S.C. § 1326, is the second-most frequently prosecuted federal offense, amounting to more than a quarter of all federal sentencings. NACDL Br. 10. Nearly half of the defendants convicted of illegal reentry face maximum sentences of twenty years, rather than the lower statutory maximums of two or ten years, because they have been convicted of aggravated felonies. *Id.* The INA's aggravated felony definition is a true hybrid statute, with significant criminal and civil applications. If it is ambiguous, the rule of lenity is the proper interpretive guide.

Under the government's view of *Chevron*, it would be possible for a statute to have two inconsistent meanings, one in civil cases due to *Chevron*, and a different one in criminal cases due to the rule of lenity. But a statute is not "a chameleon, its meaning subject to change depending on" the type of case in which it appears. *Clark v. Martinez*, 543 U.S. 371, 382 (2005). It would make no sense to give "the same word, *in the same statutory provision*, different meanings *in different factual contexts*." *United States v. Santos*, 553 U.S. 507, 522 (2008) (plurality opinion). For this reason, the Court has repeatedly stated that when a statute has both civil and criminal applications, like the INA's aggravated felony definition, the appropriate canon of construction is the rule of lenity, not *Chevron*. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992)

(plurality opinion); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1336 (2011); *see* Pet. Br. 39-41.

This principle applies to all statutes with both civil and criminal applications, not, as the government contends (U.S. Br. 49 n.6), merely to statutes that appear in Title 18. *Thompson/Center*, 504 U.S. at 518 n.10 (rejecting the notion that "in order for the rule of lenity to apply, the statute must be contained in the Criminal Code"); *see, e.g.*, *id.* at 518 (applying the rule of lenity to a statute in Title 26); *Kasten*, 131 S. Ct. at 1336 (noting that the rule of lenity would apply to a statute in Title 29 if it were ambiguous). Statutes with both civil and criminal applications are governed by the rule of lenity to ensure that they are interpreted consistently in both contexts, not because of any formalistic concern about whether a statute has been placed in Title 18.

In prior cases involving the INA's aggravated felony definition, the Court has therefore either applied the rule of lenity or analyzed the statutory text without even discussing deference to the agency's position. *See Moncrieffe*, 133 S. Ct. at 1693 (applying rule of lenity); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) (applying rule of lenity); *Nijhawan v. Holder*, 557 U.S. 29 (2009) (no reference to *Chevron* despite ruling in favor of government and despite government's request for *Chevron* deference, *see* U.S. Br. at 14-15, *Nijhawan v. Holder*, No. 08-495 (Mar. 25, 2009)); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) (no reference to *Chevron* despite ruling in favor of government); *Lopez*, 549 U.S. 47

(2006) (no reference to *Chevron*); *Leocal*, 543 U.S. at 11 n.8 (applying rule of lenity).

The government ignores all these cases and relies instead (U.S. Br. 48) on a pair of cases in which the Court deferred to agency regulations with criminal applications, but the government's cases are easily distinguishable, because they involved statutes in which Congress explicitly delegated to the agency the power to issue regulations with criminal consequences. *See United States v. O'Hagan*, 521 U.S. 642, 673 (1997); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704 n.18 (1995); *see* Pet. Br. 42-43.[2] Even if agencies are entitled to deference in that situation—a proposition that is by no means obvious, *see Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting the denial of certiorari) (characterizing *Sweet Home Chapter* as a "drive-by ruling" that "deserves little weight"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 734-35 (6th Cir. 2013) (Sutton, J., concurring) (interpreting *Sweet Home Chapter* narrowly so as not to defer to an agency's interpretation of a statute with criminal applications)—agencies receive no deference when they resolve ambiguities in statutes with criminal applications. Interpreting such statutes is a task for courts, not agencies. *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

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[2] The government includes *Kasten* in this list (U.S. Br. 48), but in *Kasten* the Court noted that the rule of lenity would have governed had the statute at issue been ambiguous, because it was "a statute with criminal sanctions [that was] applied in a noncriminal context." *Kasten*, 131 S. Ct. at 1336.

Even if we put the rule of lenity aside, there are several reasons—which the government fails to acknowledge—for rejecting *Chevron* deference when agencies interpret statutes with criminal applications. Deference would authorize the executive branch to define the very criminal conduct it prosecutes, in violation of the basic separation-of-powers principle that only the legislative branch may define crimes. Deference would turn agencies into policymakers in criminal matters, a field in which they have no expertise. Deference would allow the criminal law to change from one administration to the next without any action from Congress, a result irreconcilable with the axiom that the criminal law must "give ordinary people fair notice of the conduct it punishes." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). NACDL Br. 17-24.

Second, this case is also governed by "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (citation and internal quotation marks omitted). The government's view of *Chevron* would abolish this principle, because in deportation cases the alien's adversary is always the agency that interprets the immigration statute. If ambiguities in deportation statutes were construed in the government's favor under *Chevron*, there would never be any opportunity for the presumption in favor of the alien to operate. But *Chevron* did not silently overrule the presumption, as is indicated by the several post-*Chevron* cases discussing it. *See Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012); *St. Cyr*, 533 U.S. at

320; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Indeed, as the government sees it (U.S. Br. 51), *all* principles of statutory construction are mere "canons of last resort" that courts may employ only after deferring to the agency's view of the statute. The government is mistaken. The standard canons of construction are applied at step one of *Chevron*, not at step two. Courts "only defer ... to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (citation and internal quotation marks omitted). Thus the Court has applied the presumption against preemption at step one to discern the meaning of a statute, rather than deferring at step two to the agency's view in favor of preemption. *Wyeth v. Levine*, 555 U.S. 555, 576-77 (2009). The Court has applied the presumption against implied rights of action at step one rather than deferring at step two to the agency's view in favor of an implied right of action. *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). The Court has applied the presumption against reaching difficult constitutional questions at step one rather than deferring at step two to the agency's view that Congress legislated to the outer limit of its power. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001). The criminal rule of lenity and the presumption in deportation cases likewise apply at step one, before considering the agency's view, not at step two.[3]

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[3] Contrary to the government's assertion (U.S. Br. 51-52), the Court has never discussed the relationship between *Chevron*

If we step back a bit, the incongruity of the government's *Chevron*-beats-everything position becomes even more apparent. The rule of lenity is older than the United States, and "perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). Some of the other canons of statutory interpretation have existed for nearly as long. The presumption in favor of the alien in deportation cases dates at least to the 1940s. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). These doctrines are much older than *Chevron*. The *Chevron* Court can scarcely have intended to make such dramatic changes to all these background norms of construction, without saying a word about it.

The BIA's view is in any event unreasonable, so it would be unworthy of deference even under *Chevron*. The BIA's second *Vasquez-Muniz* opinion rests entirely on the BIA's mistaken view that a literal reading of the statute would make nullities out of three provisions—the penultimate sentence's reference to state offenses, the penultimate sentence's reference to foreign offenses, and 8 U.S.C. § 1231(a)(4)(B)(ii)'s reference to state convictions. Pet. Br. 48-49. The government, quite rightly, advances none of these erroneous theories in this Court.

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and the presumption in favor of the alien in deportation cases. The alien did not raise the presumption in *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012), or *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). In *Negusie v. Holder*, 555 U.S. 511, 521 (2009), the Court declined to reach the question whether the BIA was entitled to deference, so there was no occasion to discuss whether deference comes before or after application of the presumption.

Yet the government defends (U.S. Br. 52-55) the BIA's opinion with arguments that are no better. The BIA's mistaken belief that the penultimate sentence "'reflects a concern over substantive offenses rather than any concern about the jurisdiction in which they are prosecuted,'" U.S. Br. 52 (quoting *In re Vaszquez-Muniz*, 23 I. & N. Dec. 207, 210 (BIA 2002)), ignores the distinction in the aggravated felony definition between offenses (like murder) named generically and offenses (like arson) covered only as "described in" specified federal statutes. The BIA's worry that a literal reading of the statute would mean that "'virtually no state crimes would ever be included in'" subsection E, U.S. Br. 52 (quoting *Vasquez-Muniz*, 23 I. & N. Dec. at 211), is beside the point, because the penultimate sentence does not say that every single subsection of the aggravated felony definition must include state crimes. Pet. Br. 29-30. The BIA's concern about excluding "'grave'" foreign offenses, U.S. Br. 53 (quoting *Vasquez-Muniz*, 23 I. & N. Dec. at 212), is groundless for the reasons we have already discussed. Virtually all serious state and foreign offenses not defined as aggravated felonies under subsection E are covered by other parts of the aggravated felony definition and also render aliens removable on several other grounds. The BIA got it right the first time, before it flip-flopped. *See In re Vasquez-Muniz*, 22 I. & N. Dec. 1415, 1422 (BIA 2000) ("Given ... the ordinary meaning of the phrase 'described in,' and the manner in which this phrase has customarily been used in federal laws and regulations, we cannot find adequate support for the Service's position that an element of the crime

'described in' [a specified federal statute] can simply be ignored").

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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